

DEPARTMENT OF INDUSTRIAL RELATIONS

**OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

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NOTICE OF PUBLIC HEARING OF THE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
AND NOTICE OF PROPOSED CHANGES TO TITLE 8
OF THE CALIFORNIA CODE OF REGULATIONS

Pursuant to Government Code Section 11346.4 and Labor Code Sections 148.7, the Occupational Safety and Health Appeals Board of the State of California has set the time and place for Public Hearings on proposed changes to its rules of practice and procedure found in Title, 8, California Code of Regulations, Division 1, Chapter 3.3, Articles 1, 3 and 4, Sections 354, 371.2, 373, 376.1, and 386:

PUBLIC HEARINGS: On September 17, 2012 at 10:00 a.m.
Occupational Safety and Health Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, California 95833

DISABILITY ACCOMMODATION NOTICE: Disability accommodation is available upon request. Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the public hearings of the Occupational Safety and Health Appeals Board should contact the Disability Accommodation Coordinator at (916) 274-5751 or the state-wide Disability Accommodation Coordinator at 1-866-326-1616 (toll free). The state-wide Coordinator can also be reached through the California Relay Service, by dialing 711 or 1-800-735-2929 (TTY) or 1-800-855-3000 (TTY-Spanish).

Accommodations can include modifications of policies or procedures or provision of auxiliary aids or services. Accommodations include, but are not limited to, an Assistive Listening System (ALS), a Computer-Aided Transcription System or Communication Access Realtime Translation (CART), a sign-language interpreter, documents in Braille, large print or on computer disk, and audio cassette recording. Accommodation requests should be made as soon as possible. Requests for an ALS or CART should be made no later than five (5) days before the hearing.

OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

MICHAEL WIMBERLY, Executive Officer

NOTICE OF PROPOSED CHANGES TO TITLE 8
OF THE CALIFORNIA CODE OF REGULATIONS
BY THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Notice is hereby given, pursuant to Government Code Section 11346.4, that the Occupational Safety and Health Appeals Board, pursuant to the authority granted by Labor Code Section 148.7, and in order to implement Labor Code Sections 148.7, 148.8 and 6603, will consider the following proposed revisions to Title 8, Rules of Practice and Procedure, of the California Code of Regulations, as indicated below, at its Public Hearing on September 17, 2012.

TITLE 8: RULES OF PRACTICE AND PROCEDURE

Chapter 3.3, Subchapter 4, Articles 1, 3 and 4
Sections 354, 371.2, 373, 376.1, and 386.

INFORMATIVE DIGEST OF PROPOSED ACTION/POLICY STATEMENT OVERVIEW

The Occupational Safety and Health Appeals Board (Board) is charged with hearing and resolving appeals filed by employers for occupational safety and health citations issued by the Division of Occupational Safety and Health. California Labor Code Section 148.7 authorizes the Board to adopt rules of practice and procedure for the matters that fall within its jurisdiction. The Board has adopted regulations to govern the appeals process and the procedure for reconsidering decisions made on such appeals (Title 8, California Code of Regulations, Sections 345-397).

354: Party Status

Existing law allows either an affected employee or an authorized employee representative to participate as a party in an appeal. An “authorized employee representative” is defined in section 347 as a labor organization which represents the affected employee and has an existing relationship with the employer. Currently, two impediments can prevent an affected employee from obtaining party status. If either the affected employee dies during the pendency of the appeal, or his or her labor organization requests party status first, the affected employee is barred from participating in the appeal as a party. However, the Labor Code requires an affected employee be afforded the opportunity to participate as a party in Appeals Board proceedings.

The proposed changes will remove both of these obstacles. First, it will allow one of a short list of surviving family members to take up the deceased affected employee’s party participation in the Appeals Board proceeding. The proposed changes also allow the affected employee (or if deceased, a listed relative) and the labor representative to participate as parties in the same proceeding. The changes do not alter the existing rights of affected employees and add no substantive rights beyond those already contained in the Labor Code. The change strives to further protect the health and safety of California workers by broadening their ability to participate in proceedings wherein such health and safety has been deemed lacking or insufficient by the

Division of Occupational Safety and Health (Division) and the employer has appealed the health and safety violation citations issued by the Division.

371.2: Amendments

Existing regulations allow for the amendment of citations and appeals only by proper written motion. The rules require all motions to be in writing and to be filed at least 20 days prior to the hearing date. Motions filed closer to the hearing date may only be considered if good cause for the late filing is also established, unless timeframes or other particulars for such motion are otherwise ordered by the Administrative Law Judge. Labor Code section 6603 requires Board rules to be consistent with Government Code section 11507. Denying a motion to amend a citation made within the 20 days preceding the date of the hearing disregards this requirement and results in meritorious amendment requests being denied for lack of timeliness rather than on the merits.

The proposed change requires an ALJ to decide a request to amend a citation or appeal based on the merits of the request, rather than only on its timing. The rule requires the ALJ to first determine if the requested amendment falls within the general set of facts as the original citation or appeal, such that the amendment would relate back to the original document. If so, the ALJ then determines whether the request causes prejudice to the party opposing it and is directed to evaluate the evidence that the opponent would be unable to present as a result of the timing of the request. If there is no prejudice, the amendment request may be granted. This proposed change prevents technical, non-substantive and non-misleading errors in the citation or appeal from defeating a citation or appeal. If there is prejudice but the proponent of the amendment demonstrates good cause for failing to bring the request prior to 20 days before the hearing, the amendment may be granted. This rule balances the need to avoid frequent continuances caused by unlimited amendment requests made at the hearing with the need to resolve all appeals on the merits.

373: Expedited Proceeding

Existing law allows the Appeals Board to expedite any appeal on motion of a party or on its own motion. Currently, no rules determine when an appeal should be or will be expedited, thus the Appeals Board is only allowed to expedite appeals on a case-by-case basis.

The proposed amendment defines the types of appeals that will automatically be expedited and the timeframes that apply for those cases. Appeals of citations classified as Serious, Willful, Repeat, or any combination thereof will be set for hearing within 120 days of docketing of the appeal. A status conference and a prehearing conference will also be held within that time. If an employer shows proof of abatement or does not appeal the abatement ordered by the Division, the appeal will not be automatically expedited. The amendment preserves the ability of the Appeals Board to expedite a case more quickly if circumstances warrant.

376.1 Conduct of Hearing

According to existing regulation, the authority of an ALJ to consider a continuance at the time of the hearing is limited to occasions when unforeseen circumstances, including but not limited to death of a necessary participant, occur or when a subpoenaed witness fails to appear. However, existing law also grants the Administrative Law Judge the authority to issue any “orders”

necessary to a “full adjudication” of the merits of the appeal. The proposed amendment would reconcile these two portions of the rules and allow the ALJ to consider a continuance of a matter at the hearing for “good cause”, as well as for the two circumstances currently listed.

386 Post-Submission Amendments

The existing regulation limits the circumstances when an Administrative Law Judge may amend a citation or appeal after the matter has been submitted. It further prohibits an Administrative Law Judge from granting a continuance of any matter to cure any prejudice demonstrated by a party opposing any post-submission amendment. Thus, all post-submission amendments are prohibited if any prejudice may be shown to result from the amendments. However, the enabling legislation directs that if such a proposed post-submission amendment results in prejudice to an employer, a continuance to cure such prejudice shall be held.

The proposed change would remove the restriction in the Board’s procedural rules so that the rules are consistent with the enabling legislation, specifically Government Code section 11516. If an ALJ proposes a post-submission amendment which is shown to cause prejudice to the opponent and the prejudice can be cured by a granting a continuance, the holding of further hearings to cure the prejudice will be justified.. The rule remains that no post-submission amendment is required in any case but rather remains within the discretion of the Administrative Law Judge.

Policy Statement Overview

The objective of the proposed changes is to increase workplace health and safety by removing some existing impediments to full, timely adjudication of cases on the merits. Changes to sections 371.2, 376.1 and 386 have as their objective the reduction or elimination of gamesmanship that occurs in the appeal process as a result of the existing Rules of Practice and Procedure concerning amendment of a citation or appeal.

Changes to section 373 have the policy objective of improving workplace safety and health by expediting appeals in which the alleged violation has been classified as Serious, Willful, Repeat, or any combination thereof and where the employer fails to voluntarily abate the condition as ordered by the Division.

The policy objective of the proposed changes to section 354 (regarding party status) is to increase workplace health and safety by strengthening the procedural participation rights of affected employees and their authorized union representatives to the full extent authorized by statute.

In addition to improving workplace health and safety, all of these proposed changes have the specific benefit of promoting fairness and social equity by allowing full participation of those granted the right to be a party as stated in the Labor Code, as well as by inhibiting the availability of a complete defense based on inarticulate or incorrect pleading by Division personnel or unrepresented employers who are not lawyers. Removing the ability to take advantage of mere pleading defects encourages the parties to focus on the merits of every case, which promotes early settlement and greater efficiency.

Compatibility with Other Laws:

None of these proposals are substantially different from existing, comparable federal statutes or regulations.

The proposed regulatory changes bring the Rules of Practice and Procedure in conformity with other state laws, in particular, Government Code sections 11507 and 11516. No proposed changes are inconsistent or incompatible with existing state regulations.

DOCUMENTS INCORPORATED BY REFERENCE

None.

COST ESTIMATES OF PROPOSED ACTION

Costs or Savings to State Agencies

No costs or savings to state agencies will result as a consequence of the proposed action.

Impact on Housing Costs

The Board has made an initial determination that this proposal will not significantly affect housing costs.

Results of the Economic Impact Analysis

The proposed regulation will not have any effect on the creation or elimination of California jobs or the creation or elimination of California businesses or affect the expansion of existing California businesses.

This regulatory proposal is intended to support the Occupational Safety and Health program which promotes worker safety at places of employment in California. The anticipated benefits are to workplace safety and health.

Cost Impact on Private Persons or Businesses

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Business Impact

The Board has made a determination that this proposal will not result in a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

Costs or Savings in Federal Funding to the State

The proposal will not result in costs or savings in federal funding to the state.

Costs or Savings to Local Agencies of School Districts Required to be Reimbursed

No costs to local agencies or school districts are required to be reimbursed. See explanation under “Determination of Mandate.”

Other Non-discretionary cost or savings imposed upon local agencies

No other non-discretionary cost or savings are imposed on local agencies as a result of these proposed changes.

DETERMINATION OF MANDATE

The Occupational Safety and Health Appeals Board has determined that the proposed regulations do not impose a local mandate. Therefore, reimbursement by the state is not required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code, because these regulations do not constitute a “new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.” The California Supreme Court has established that a “program” within the meaning of Section 6 of Article XIII B of the California Constitution is one which carries out the governmental function of providing services to the public or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

These proposed regulations do not require local agencies to carry out the governmental function of providing services to the public. Rather, the regulations require local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, these proposed regulations do not in any way require local agencies to administer the California Occupational Safety and Health program. (See City of Anaheim v. State of California (1987) 189 Cal.App.3d 1478.)

The proposed regulations do not impose unique requirements on local governments. All employers - state, local and private - will be required to comply with the proposed standards.

EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendments may affect small businesses. However, no adverse economic impact is anticipated. The proposal allows for more citations and appeals to be heard on the merits by allowing the correction of technical or pleading errors. Fewer decisions will be reached based on factors other than the merits. This improves settlement rates. This regulatory proposal will promote worker safety by improving the appeals process. Therefore, the Board believes the proposal will have insignificant, if any, adverse cost impact upon employers’ operations.

BUSINESS REPORTING REQUIREMENT

The Board has determined that these changes do not require a report (Government Code 11346.5(a)(11); 11346.3(d))

ALTERNATIVES STATEMENT GOVT. CODE 11346.5(a)(13)

The board must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

DOCUMENT AVAILABILITY

A copy of the proposed changes in STRIKEOUT/UNDERLINE format is available upon request made to the Occupational Safety and Health Appeals Board's Sacramento office at 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833, (916) 274-5751. Copies will also be available at the Public Hearing.

An INITIAL STATEMENT OF REASONS containing a statement of the purpose and factual basis for the proposed actions, as well as a description of any identified alternatives considered, has been prepared and is available upon request from the Appeals Board's Sacramento office.

The Occupational Safety and Health Appeals Board's rulemaking file on the proposed actions, including all the information upon which the proposals are based, are open to public inspection Monday through Friday from 8:30 a.m. to 4:30 p.m. at the Appeals Board's Sacramento Office.

The full text of proposed changes, including any changes or modifications that may be made as a result of the public hearing, shall be available from the Chief Counsel 15 days prior to the date on which the Appeals Board adopts the proposed changes.

Once the Final Statement of Reasons is prepared, it may be obtained by calling the telephone number listed above.

The Board's notice and the other materials associated with this proposal may be accessed via the Appeals Board's website, the address for which is <http://www.dir.ca.gov/oshab>.

PUBLIC COMMENT

Notice is also given that any interested person may comment on this proposal in writing or orally at the public hearing. It is required that written comments be submitted so that they are received no later than September 17, 2012 at 5:00 p.m. PST.

The official record of the rulemaking proceedings will be closed at the conclusion of the public hearing and written comments received after 5:00 p.m. PST on September 17, 2012 will not be considered by the Board unless the Board announces an extension of time in which to submit

written comments. Written comments should be mailed to the address provided above, submitted by fax to (916) 274-5785 or e-mailed to oshab@dir.ca.gov. The Occupational Safety and Health Appeals Board may thereafter adopt the above proposal substantially as set forth without further notice.

CONTACT PERSONS

Inquiries concerning either the proposed administrative action or the substance of the proposed changes may be directed to Jeff Mojcher, Chief Counsel or Michael Wimberly, Executive Officer, at (916) 274-5751.

OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

MICHAEL WIMBERLY, Executive Officer

Attachments